

Department of Energy

Idaho Operations Office
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Idaho Falls, Idaho 83401-1563

Purpose

This letter documents the intent of the State of Idaho, the U. S. Environmental Protection Agency (EPA), and the U. S. Department of Energy (DOE) to pursue accelerated risk reduction and cleanup in the Environmental Management (EM) Program at the Idaho National Engineering and Environmental Laboratory (INEEL). The parties have established a focused vision for the accelerated cleanup strategy:

By 2012, the INEEL will have achieved significant risk reduction and will have placed materials in safe storage ready for disposal. By 2020, INEEL will have completed all active cleanup work with potential to further accelerate cleanup to 2016.

This vision reflects a bias toward real risk reduction within the framework of the existing compliance agreements that address cleanup of the INEEL. The parties recognize the importance of project management, engineering, science, and technology, to achieve cleanup goals faster and more cost effectively.

The parties agree that accelerated cleanup and meeting commitments are made more attainable with sufficient and predictable funding, good regulatory relationships, broad stakeholder support, and best management practices.

Through actions proceeding from this letter of intent, the parties expect to meet the objectives called for in the President's fiscal year 2003 budget request to access the Cleanup Reform Account.

Background

Cleanup of the INEEL is governed by two primary compliance agreements. These agreements include a bias toward actual cleanup; the parties agree to continue this bias and to integrate

cleanup activities at INEEL. The strategy outlined in this letter gives the INEEL the opportunity to accelerate risk reduction and cleanup and to do so from an integrated, site-wide perspective.

Overview of 2012 Accelerated Cleanup Strategy

In addition to the parties' recent agreement regarding restructuring of the waste retrieval project at Pit 9, the 2012 Accelerated Cleanup Strategy focuses on significant environmental priorities identified by DOE, the State of Idaho, EPA, and stakeholders. These priorities are:

1. Continued cleanup and protection of the Snake River Plain Aquifer
2. Consolidation of EM activities to the Idaho Nuclear Technology and Engineering Center (INTEC), reducing the actively managed EM footprint by over 51%
3. Removal and stabilization of sodium-bearing liquid wastes from the INTEC tank farm and RCRA closure of the high-level waste tanks
4. Placement of DOE spent nuclear fuel (240 tonnes) managed by EM into dry storage
5. Transfer of all Special Nuclear Material managed by EM to other sites
6. Completion of the shipments of transuranic waste required by section B.1 of the Settlement Agreement entered in *Public Services of Colorado v. Batt*, Nos. 91-0035-S-EJL & 91-0054-S-EJL (Oct. 17, 1995).
7. Making significant progress in the remediation of the buried waste in accordance with the comprehensive Remedial Investigation/Feasibility Study and Record of Decision for WAG 7

This strategy accelerates completion of several of these priority projects from the current baseline. It places material without a near-term disposition path (specifically spent nuclear fuel and high-level waste) into safe storage and ready for ultimate disposal. The cleanup approach also incorporates opportunities for dramatic footprint reduction within INEEL's major facilities. In developing this approach, it became clear that the cleanup program could rapidly consolidate its activities to the INTEC facility and significantly reduce infrastructure, surveillance, and maintenance costs.

End State

By 2020, all waste sites have been either: 1) removed and back filled or 2) capped; all EM-managed excess buildings have been transferred to another sponsor or removed; and remaining high-level waste calcine and spent nuclear fuel is in safe storage awaiting disposal.

This cleanup strategy accelerates the completion of key milestones in INEEL's compliance agreements and provides a basis for realistic, defensible, and stable cleanup funding. It provides a clear completion focus for cleanup by 2020 while not conflicting with other DOE missions at the INEEL; in fact, completing risk reduction and cleanup of the INEEL should facilitate opportunities for new and continuing missions.

DOE agrees to smoothly transition laboratory sponsorship from Environmental Management to other program sponsors. DOE also recognizes the need for long-term stewardship of site environmental obligations following completion of active cleanup.

This strategy can be accomplished within the existing compliance agreements but requires a proactive and sustained commitment by all three agencies to implement an integrated approach to regulatory issues so that projects can be accomplished as responsibly as possible.

In pursuing this strategy, the agencies agree to:

- Consider high risks first as a principle in setting priorities and cleanup strategies, recognizing there are multiple factors that need to be considered, such as balancing risk to workers, the public, and the environment
- Effectively integrate RCRA and CERCLA cleanup actions and schedules
- Re-sequence cleanup work as appropriate to better integrate cleanup actions at INEEL facilities
- Evaluate post-cleanup monitoring and review cleanup effectiveness from an integrated, INEEL-wide perspective
- Invest in projects and activities that will result in significant savings that can be applied to accelerate cleanup
- Accelerate waste characterization to facilitate decision making and integration opportunities

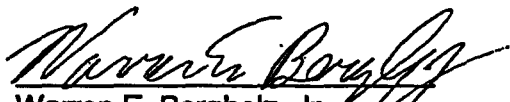
Further, the parties agree to approach cleanup as a single project and support integration across INEEL's compliance agreements as appropriate. DOE will produce, in collaboration with EPA and the State of Idaho, a draft management plan supporting this approach in June 2002, and following public involvement, a final plan by August 1, 2002. The parties agree that routine senior management meetings will be held to assess the status and progress toward the accelerated goals and to assist in resolving issues and barriers that stand in the way of successful implementation.

This accelerated cleanup strategy depends on successful resolution of several key uncertainties:

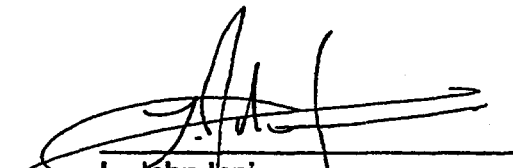
- Resolving repository issues such as characterization requirements and acceptance criteria
- Resolving transportation issues such as the need for waste stabilization prior to transport
- Resolving waste characterization issues
- Resolving the interpretation of section B.1 of the Settlement Agreement entered in *Public Services Company of Colorado v. Batt*, Nos. 91-0035-S-EJL & 91-0054-S-EJL (Oct. 17, 1995).

Nothing in this letter of intent modifies the rights, authorities or obligations established in existing agreements.

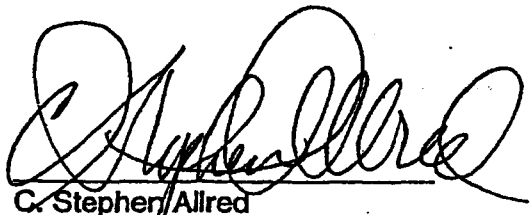
We, the undersigned, are committed to work together in support of these initiatives, to successfully implement this accelerated risk reduction and cleanup strategy, and to seek additional opportunities to further accelerate and improve cleanup of the INEEL.



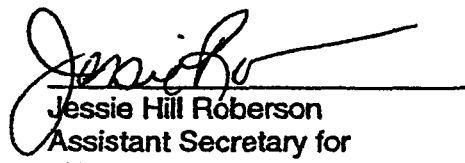
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L. John Iani
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Department of Energy

Idaho Operations Office
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December 20, 2002

Mr. Ronald Kreizenbeck
Deputy Regional Administrator
EPA Region 10
1200 6th Avenue
Seattle, WA 98101

Mr. C. Stephen Allred
Administrator
Idaho Department of Environmental Quality
1410 North Hilton
Boise, ID 83706

SUBJECT: Submittal of Statement of Dispute to Dispute Resolution Committee under Sections 9.2(c) - (e), and 11.2 of the Federal Facility Agreement and Consent Order (FFA/CO) regarding the Notice of Violation (NOV) for Waste Area Group 3, Operable Unit (OU) 3-13 – OCC-02-131

REFERENCES:

- 1) December 4, 2002 Letter from Ronald Kreizenbeck, Deputy Regional Administrator, to Warren Bergholz, Subject: "Notice of Violation and Penalty Assessment"
- 2) July 26, 2002, OU 3-13, Group 1, Letter transmitting the Draft Interim Remedial Action Report (DOE/ID-11007, Rev. 0, July 2002)

Dear Messrs. Kreizenbeck and Allred:

Enclosed is the Department of Energy's Statement of Dispute responding to the Notice of Violation (NOV) dated December 4, 2002, in relation to the subject Tank Farm Soils Interim Action. We were greatly perplexed and dismayed to receive this NOV under circumstances that fundamentally threaten the accelerated cleanup at the Idaho Environmental and Engineering Laboratory (INEEL).

Mr. Ronald Kreizenbeck
Mr. C. Stephen Allred

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December 20, 2002

By submitting this written Statement of Dispute regarding the NOV, this matter is elevated to the Dispute Resolution Committee for resolution. It is hoped that the active involvement of this level of senior leadership from our agencies will lead to the development of a broadly supported resolution that reflects our agreed upon priorities and concerns. Mr. Robert Stallman, Assistant Manager for Environmental Management, of my staff is our designated individual to serve on the DRC. If you need further information regarding the DRC, please contact Mr. Stallman at (208) 526-1995, by FAX at (208) 526-0598, and via e-mail at stallmrm@id.doe.gov. His designated alternate is Ms. Lisa Green, per Section 9.2(d) of the FFA/CO.

At the core of this dispute are our basic assumptions and understandings about our clean-up priorities and efforts at the INEEL. In order to ensure the continued viability of our mutually supported goals as reflected in the Letter of Intent signed by our agencies in May 2002, a prompt and significant effort will be required. This is further complicated by the fact that the holiday season is upon us. Since the Paragraph 9.2(e) of the FFA/CO generally prescribes a 21-day period for the Dispute Resolution Committee (DRC) to come to agreement, I am requesting a conference call during the week of January 6th to establish an extended schedule and process to resolve this dispute. During this call we can establish a mutually acceptable extended time frame for the DRC to complete its dispute resolution activity. Preliminarily, I would propose to extend the time until February 1, 2003.

This dispute has ramifications far beyond the specific facts of this instance. At issue is the entire concept of accelerated cleanup and focusing resources on risk reduction. To address these broader issues on a site-wide basis, we would suggest that the three agencies also consider initiating a process similar to that employed by Hanford to address accelerated cleanup issues and disputes. I will be proposing this to the Core Management Team.

Thank-you for your prompt attention to this matter.

Sincerely,



Warren E. Bergholz, Jr.
Acting Manager

Enclosure

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STATEMENT OF DISPUTE

**RE:
Notice of Violation
Regarding the
Draft Remedial Action Report for the Tank Farm Soils**

The Department of Energy, Idaho Operations Office (DOE) respectfully submits this Statement of Dispute¹ regarding the Notice of Violation (NOV) issued by the Environmental Protection Agency, Region 10 (EPA)². The NOV alleges that: "DOE has violated the [Federal Facility Agreement and Consent Order] FFA/CO by failing to submit the Remedial Action Report for Operable Unit (OU) 3-13, Group 1 in accordance with the established deadline." The primary concern of the NOV appears to be focused on the interim remedial action of applying a temporary polyurea surface sealant to the tank farm soil.

DOE is disputing this NOV because it fundamentally undercuts the representations and agreements reached by the three parties to the FFA/CO for accelerated cleanup at the Idaho National Environmental and Engineering Laboratory (INEEL). It is acknowledged that, as described in detail in the Remedial Action Report, not all of the construction activities for the Group 1 Tank Farm Interim Action project have been met as identified in the RD/RA Work Plan. The reasons for this are discussed below.

Although EPA's procedure in pursuing enforcement actions against DOE is understood, the necessity of going forward with such an action at this time is neither equitable nor consistent with the agreed upon approach to the cleanup of INEEL and the policies of the current administration toward accelerated cleanup. Consistent with the Letter of Intent regarding accelerated cleanup that DOE, EPA and the State signed in late May, 2002³, DOE has proposed re-sequencing work at the tank farm in order to achieve earlier overall cleanup of the tank farm tanks and soils, including an earlier final remedy. By initiating this enforcement action EPA appears to be drawing the tank farm interim action discussion away from the context of achieving earlier overall cleanup to one of rigid and inflexible adherence to previously established FFA/CO milestones. This lack of willingness to re-sequence work, including adjusting milestones when appropriate, is of great concern to DOE, because it is incompatible with DOE's ability to achieve the goals of the Performance Management Plan (PMP)⁴ and inconsistent with the flexibility committed to in your July 11, 2002⁵, letter in support of the PMP.

This Statement of Dispute will discuss the following key topics:

1. The Performance Management Plan process established a common vision for accelerated cleanup. DOE believed that EPA and the State had committed to be

¹ FFA/CO §§ 9.2(c), (d) and 11.2

² The NOV is dated December 4, 2002, and was received by DOE on December 9, 2002.

³ Exhibit 1.

⁴ Exhibit 2.

⁵ Exhibit 3.

"flexible and work collaboratively with DOE to achieve" the goals of accelerated cleanup "despite the inevitable thorny policy and regulatory issues that may arise" in matters such as "integrating milestones associated with the tank farm closure and remediation."⁶

2. The assumptions regarding schedules and milestones in the original RD/RA Work Plan have changed.
3. Re-sequencing the work makes sense.
4. The status of work is clearly presented in the Draft Remedial Action Report.
5. The EPA and the State should address PMP and accelerated cleanup under the FFA/CO.
6. EPA should reduce or eliminate the fines imposed because of the circumstances and mitigating factors, consistent with EPA policy and applicable law.

DOE requests a meeting of the Dispute Resolution Committee for resolving the dispute and for establishing appropriate milestones.

I. The Performance Management Plan process established a common vision for accelerated cleanup.

In May 2002, DOE, EPA, and the Idaho Department of Environmental Quality signed a Letter of Intent formalizing an agreement to pursue accelerated risk reduction and cleanup at the INEEL.⁷ The letter provides the foundation for a collaborative plan for the accelerated cleanup of the INEEL, fulfilling the agreed upon vision:

"By 2012, the INEEL will have achieved significant risk reduction and will have placed materials in safe storage ready for disposal. By 2020, the INEEL will have completed all active cleanup work with potential to further accelerate cleanup to 2016."

The strategy outlined in the letter "gives the INEEL the opportunity to accelerate risk reduction and cleanup and to do so from an integrated, site-wide perspective." In pursuing this strategy, the agencies agreed to:

- Consider high risks first as a principle in setting priorities and cleanup strategies, recognizing there are multiple factors that need to be considered, such as balancing risk to workers, the public, and the environment.
- Effectively integrate RCRA and CERCLA cleanup actions and schedules.
- Re-sequence cleanup work as appropriate to better integrate cleanup actions at INEEL facilities.

⁶ Joint letter dated July 11, 2002 (Exhibit 3).

⁷ Exhibit 1.

Our three agencies agreed "to approach cleanup as a single project and support integration" of our various cleanup requirements.

This Letter of Intent was the culmination of a significant national effort geared toward accelerating cleanup. The DOE's Environmental Management Program nationally was moving toward an accelerated risk based cleanup strategy. A team chartered by the DOE's Office of Environmental Management (EM) performed a 3-day onsite review at the INEEL on October 1-3, 2001. As follow-on to this initial review of the INEEL, the Idaho Operations Office (ID) Manager chartered an INEEL integrated review team to more thoroughly evaluate alternative cleanup strategies to accelerate cleanup at the INEEL. In February of 2002, DOE conducted public meetings in Idaho Falls and Twin Falls summarizing our activities. At these public meetings, DOE presented a "Strawman INEEL 2012 Cleanup Strategy," and explained that in order to fully implement such a revised cleanup strategy, DOE-ID would have to successfully obtain the support of the state of Idaho and the regulatory community (particularly the Idaho Department of Environmental Quality (DEQ) and the U. S. Environmental Protection Agency). While we expected that no change in the Idaho Settlement Agreement would be necessary under this scenario we expected to seek some changes in the Action Plan of the 1991 FFA/CO among DOE, the state of Idaho, and EPA. We also explained that these changes would require the approval of our regulators.

In addition, DOE explained that the Administration was prepared to increase site-specific budget requests as sites demonstrated a transformational approach to accelerating cleanup with the expectation that the acceleration achieved by such near-term increases will lead to significant decreased costs in later years and substantially less costs to taxpayers overall. An agreement with the state and EPA on a path forward for achieving an accelerated cleanup strategy would meet criteria for access to the Administration's proposed Cleanup Reform Appropriation.

It was at this time that DOE reached out to the regulatory community and transmitted an initial draft of the Top-to-Bottom Options Assessment to initiate a consultative, collaborative effort for DOE to refine its strategic approach and deliberations on alternatives. After consultation with the regulatory community, DOE would be better able to formulate a realistic approach to evaluating options and subsequently could involve the general public in the details. Upon completion of this decision-making process, DOE could approach the Administration with a sound proposal that could be acceptable for obtaining additional funding from the proposed Cleanup Reform Appropriation.

At the conclusion of the Letter of Intent, DOE senior management proposed adding over \$100 million to the INEEL budget to accomplish the plan. This was based on our understanding that this would help achieve accelerated cleanup along the lines of our Letter of Intent.⁸

During the discussions, senior representatives of DOE, EPA and the State met to discuss options for accelerated cleanup. Integration of the RCRA closure requirements for the tanks with the CERCLA cleanup of the surrounding soils (the very subject of this dispute) was identified as the primary example for making progress toward accelerated cleanup. It was

⁸ Exhibit 1

agreed that the tank closure was a higher priority. It was also conceptually agreed to go forward to accomplish the proposed acceleration of more rapid tank farm closure and to renegotiate, as appropriate, milestones associated with the tank farm soils. After the Letter of Intent was signed, EPA and the State affirmed their commitment to be "flexible and work collaboratively with DOE to achieve" the goals of accelerated cleanup "despite the inevitable thorny policy and regulatory issues that may arise" in matters such as "integrating milestones associated with the tank farm closure and remediation."⁹

II. The assumptions regarding schedules and milestones in the original RD/RA Work Plan have changed.

When the original agreements were reached for the interim action regarding the tank farm soils¹⁰, the accelerated cleanup and the PMP were not factors under consideration. As a result of these factors, the fundamental underpinnings of the original plans have changed significantly. Since the parties have agreed that tank farm closure is a higher priority, DOE is expending significantly larger resources to accomplish that task. At the time that the work for the tank farm soils was originally planned, this extensive accelerated effort was not discussed or anticipated. Implementation of all prior planned actions would interfere with accomplishing these goals. These concerns surfaced during implementation of the interim action even before the objective of accelerated cleanup was introduced. Since new factors have arisen that affect the basic assumptions underlying the decisions for the interim action, the tank farm soils remediation milestones should be adjusted to accommodate accomplishing an integrated cleanup based on site-wide prioritization.

III. Re-sequencing the work makes sense.

The current approach and associated milestones, as structured under individual compliance agreements, appears to provide a plausible path for the cleanup of Idaho Nuclear Technology and Engineering Center (INTEC). However, when viewed from an overall perspective the current approach and associated milestones are not sequenced logically for accomplishing the work most efficiently and safely and achieving earliest overall completion. Specific limitations are as follows:

- The current aggressive tank closure activities (tanks emptied, cleaned, and closed) were not even under consideration when the ROD for the tank farm soils was signed.¹¹ Acceleration of tank closure, allowing for starting final soil remediation much earlier, and it somewhat alleviates the need for the interim action.

⁹ Joint letter dated July 11, 2002 (Exhibit 3).

¹⁰ E.g., October 1999 Record of Decision for the Tank Farm Soils (WAG 3, OU 3-13, Group 1); September 2000 Remedial Design/Remedial Action Work Plan for the Tank Farm Soils.

¹¹ The PMP (Exhibit 2), at page 9, states: "The tank farm at the Idaho Nuclear Technology and Engineering Center has approximately 900,000 gallons of liquid sodium bearing waste currently stored in 11 underground stainless steel tanks. The DOE and the Idaho Department of Environmental Quality's priority is to remove this liquid waste from above the Snake River Plain Aquifer." The near term accelerated interim goals include emptying the five pillar and panel vaulted tanks by June 2003, complete

- Collection of soil samples, if required for the OU 3-14 Remedial Investigation/Feasibility Study, is not logically sequenced with tank closure activities, and if conducted in the current sequence poses a potential to inadvertently breach piping containing Tank Farm liquid waste.
 - The tank farm contains a labyrinth of buried piping, which will remain active until grouted during planned tank closure activities.
 - Deep borings during soils investigations present a significant potential to damage these lines and place workers at risk. Recovery from such damage would result in significant and risky rework of buried lines in contaminated soils. Therefore, soil investigations, if needed, should only occur after lines are grouted.
 - Tank cleaning and grouting activities create congestion within the Tank Farm boundaries, leaving limited access for soil investigations until after the tanks are closed.
 - RI/FS Work Plan development should consider the sequence of tank closure, as well as priorities for mitigating areas of highest risk, to sequence and coordinate FFA/CO work with tank cleaning operations.
- Developing the OU 3-14 Record of Decision prior to Tank Farm closure as currently scheduled could lead to significant rework and likely an amendment to the Record of Decision when tank residual source terms are quantified at the end of tank closure.
 - Soil remedies to meet CERCLA requirements would be based on incomplete information until the final source term from the closed tank farm is established.
 - Current estimates for the residual source term, after tank closure, cannot be verified and updated until each individual tank is closed.
- Installation of a polyurea cover will not perform as originally intended.
 - Cover placement would require tank closure equipment to be moved off the tank farm, then back on again after placement, delaying tank-cleaning activities by several months.
 - The coating requires a well-compacted subsurface prior to application to support the heavy traffic and equipment used in the tank closure operations. Load restrictions and existing soil conditions and near-surface contaminations make proper compaction prior to application extremely difficult.

cleaning and grouting of first pillar and panel vaulted tank by September 2003, complete cleaning and grouting of second pillar and panel vaulted tank by September 2004, complete cleaning and closing of remaining pillar and panel tanks by December 2006. PMP at page 11.

- Tank closure activities, soil sampling activities, and other tank farm construction activities would all result in unavoidable, repeated and continual breaches of the cover after emplacement. This will seriously impair its performance, and though difficult to determine with any degree of uncertainty, may render it incapable of performing its function.

IV. The status of work is clearly presented in the Remedial Action Report.¹²

DOE clearly presented the status of work in the draft RA Report.¹³ DOE also explained the basis for not completing some activities - primarily because of interferences with tank closure activities and funding for this accelerated process. "Tank farm closure" as discussed in the report includes emptying the liquid waste out of the tanks, completing tank farm closure, and accelerating the CERCLA remedial investigation and remediation of the tank farm soils. The report explained that though some actions were delayed, the overall risk would be remediated more quickly. Actions that were completed to the extent possible include:

- **Evaporation Pond** – The evaporation pond, overflow system, and surrounding fence were constructed, but the pond liner and mechanical and electrical systems are not yet installed.
- **Storm Water Collection System** - The storm water collection system was partially upgraded around the tank farm and out to the discharge point per the approved work-plan drawings.
- **Impervious Covering** – The selected impervious system included a polyurea cover and asphalt paving. Paving was performed, but no polyurea was installed. Additionally, some areas originally slated for polyurea installation were paved due to practical considerations.

The key matter in this dispute is the polyurea cover. Orchestrating all the anticipated tank farm remediation activities would be difficult, at best, even without the proposed temporary cover over the tank farm. With the cover in place, it would become impractical. Covering the tank farm with a polyurea cover while the other tank farm program activities are being performed is not cost-effective or logically appropriate. Extreme congestion, tank closure activities, and the need for further characterization of the tank farm soils are issues that would make it extremely difficult to install the cover and ensure its integrity. Installation of the cover at this time would delay tank closure. It would create accessibility issues, unnecessarily increase costs substantially, and need constant repair.

DOE is committed to working with EPA and the State to explore what should be accomplished and to re-establish appropriate milestones. Additionally, DOE recognizes that there are other issues that require review and that, depending on the outcome, may

¹² Interim Remedial Action Report (Draft) for the WAG 3, OU 3-13, Group 1, Tank Farm Interim Action, July 2002, DOE/ID-11007

¹³ Id. At 1.2.1

require cyclic re-planning.

V. The EPA and the State should address PMP and accelerated cleanup issues under the FFA/CO.

The goal of the Letter of Intent and accelerated cleanup is to streamline cleanup by collaboratively working among the three agencies to clearly target and reduce the greatest health and environmental cleanup risks. We all agreed to pursue an accelerated, risk based cleanup strategy and to develop specific approaches to implement that strategy. The PMP is one aspect of the development of specific approaches. The PMP was produced in collaboration with EPA and the State of Idaho, and it provides that we would coordinate tank farm soils remediation and complete it before 2020.¹⁴ To accomplish this, the agencies agreed that "[r]emediation of the contaminated tank farm soils will be coordinated with Resource Conservation and Recovery Act closure of the tanks, will ensure risks are acceptable for protection of human health and the environment and will follow the CERCLA process for selection of the final remedy."¹⁵ This integration would result in early tank closure, which, in turn, enables early tank farm soil remediation.

Unfortunately, in practice, EPA and DEQ staff have failed to implement these policy commitments to integrate and prioritize this work. Instead, they appear to view their role as only ensuring that DOE comply with the milestones in the FFA/CO. This is reflected in the most recent EPA staff comments to the PMP,¹⁶ which reflect a view that is inconsistent with the agencies' commitments to remain "flexible" and to work through these "thorny" regulatory issues. When DOE submitted the Draft Interim Remedial Action Report, the comments from EPA and DEQ clearly indicated that no consideration would be given to the issues of integration and accelerated cleanup. DEQ stated that inclusion of these issues in the report was "wholly inappropriate."¹⁷ EPA simply refused to review the report.¹⁸

Even prior to the finalization of the Letter of Intent and PMP, DOE had raised serious concerns about the appropriateness of the plan for the tank farm soils and its impacts on higher risk cleanup actions. On August 30, 2001, DOE submitted a request for an extension of the milestone for the Draft Remedial Action Report. The lead regulatory agency, EPA, did not directly respond – but DEQ summarily dismissed the request without seriously considering the issues raised by it.¹⁹

¹⁴ PMP, at page 7 (Exhibit 2).

¹⁵ PMP, at page 10 (Exhibit 2).

¹⁶ In a November 21, 2002, letter from EPA (Exhibit 4) the following statements are suggest an unduly rigid attitude toward making changes considering the accelerated cleanup program. "The PMP cannot serve as a shield against statutory and regulatory obligations ... DOE is obligated to meet several statutory and regulatory obligations simultaneously." Comment # 13; "Accelerating some projects at the cost of delaying others is not acceptable...." Comment # 15; "The purpose of the PMP is to identify opportunities for accelerating schedules. It is not a substitute for the risk identification process established in the [NCP] and FFA/CO." Comment # 23.

¹⁷ August 30, 2002 letter from DEQ, General Comment # 4 (Exhibit 5)

¹⁸ August 15, 2002 letter from EPA (Exhibit 6)

¹⁹ September 6, 2001 DEQ letter (Exhibit 7)

In light of the commitments made in the Letter of Intent and the PMP, we are asking EPA and the State to renew their commitments to collaboratively work toward an integrated cleanup plan from a sitewide perspective. DOE has proceeded in reliance on the representations of EPA that appropriate adjustments would be made to facilitate the PMP approach. It is not constructive to "stovepipe" these matters. This effort should not be viewed as a competition between programs, but as an opportunity to accelerate cleanup and real risk reduction through an integrated approach. EPA committed to address the PMP issues under the FFA/CO, and we are asking that EPA re-examine these issues so we may "effectively integrate RCRA and CERCLA cleanup actions and schedules" and "[r]e-sequence cleanup work as appropriate to better integrate cleanup actions at the INEEL."²⁰

VI. EPA should reduce or eliminate the fines imposed because of the circumstances and mitigating factors, consistent with EPA policy and applicable law.

EPA assessed the maximum penalty amount for the alleged violation permitted under the FFA/CO. But the FFA/CO provides that a stipulated penalty may be assessed in an amount "up to" five thousand dollars for the first week and ten thousand for each additional week. Under the circumstances of this alleged violation, the assessment of the maximum amount is wholly inappropriate. Indeed, since the actions at issue are the focus of a sincere discussion among our agencies over the overall improvement of our joint cleanup efforts, any penalty assessment under these circumstances is harmful to our common remedial mission. It takes the focus away from a collaborative effort, removes funding from the cleanup program, and polarizes the agencies into a defensive, closed posture.

The statute requires EPA to consider several factors when assessing fines.²¹ EPA is required to consider such matters as "the nature, circumstances, extent and gravity" of the violations, the "degree of culpability" of the DOE, and "such other matters as justice may require." Certainly existing EPA policies call for significant reductions in any assessed penalty if significant mitigating factors are present.

In this instance, DOE completed substantial portions of the work related to the deadline at issue. DOE fully disclosed those aspects that did not comply with the original deadline. Nearly a year before the deadline was reached, DOE repeatedly engaged the regulators in an effort to adjust the milestones in a fiscally and environmentally responsible manner. In the course of events, DOE relied upon EPA's commitments to adjust the plan. Clearly, DOE's actions were not motivated by a desire to avoid cleanup, but to improve and accelerate cleanup based on real risk reduction, integration of programs, and the agreed to priorities of the agencies involved. Under these circumstances, the interests of justice and common fairness clearly dictate a substantial reduction or elimination of the fine altogether. What is really needed is a renewed effort to collaboratively revise the plan for this interim action in relationship to the concerns of integrating and accelerating cleanup on a sitewide basis.

²⁰ Letter of Intent (Exhibit 1)

²¹ 42 USC § 9609(a)(3)

DOE is most anxious to re-establish appropriate milestones for an integrated tank farm closure and soil remedy. The milestones should provide a path forward that aligns the PMP and FFA/CO.

VII. Request for a Dispute Resolution Meeting.

DOE requests that a meeting among the DRC and other appropriate senior and staff personnel be convened as soon as practical. Every effort should be made to avoid a "stovepipe" approach in resolving this dispute.

In order to ensure the continued viability of our mutually supported goals as reflected in the Letter of Intent signed by our agencies in May 2002, a prompt and significant effort will be required. Involvement of appropriate senior management should help achieve a consultative, cooperative process that allows for flexibility and promotes efficiencies and, ultimately, ensures a successful cleanup effort. We are also requesting that this stage of the dispute process be extended by mutual agreement of the parties (including the state of Idaho) in order to provide adequate time to resolve the complex issues presented. \

VIII. Conclusion

Invoking this formal dispute resolution process will provide all of our agencies an opportunity to implement our mutual commitments toward an accelerated cleanup and integrating compliance requirements at the INEEL